SUPREME COURT, U. S.

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No. 262

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

JOSEPH NAPLES,

Petitioner,

vs.

E. L. MAXWELL, WARDEN, OHIO PENITENTIARY,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF QUESTION INVOLVED

THE UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT, DID NOT ERR IN REVERSING THE DECISION OF THE UNITED STATES DISTRICT COURT GRANTING A WRIT OF HABEAS CORPUS WHEN THE RECORD DISCLOSED THAT THE SUBJECT SEARCH WARRANT WAS ISSUED AFTER AN INDEPENDENT DETERMINATION OF THE EXISTENCE OF PROBABLE CAUSE BY THE MUNICIPAL JUDGE BASED UPON PERSONAL KNOWLEDGE OF THE OFFICER MAKING THE AFFIDAVIT AND UPON RELIABLE INFORMATION OF HIS SUPERIOR OFFICER.

TABLE OF CONTENTS

Page

Statement of Question Involved i

Table of Cases Cited iv

Statement of the Case 1

Argument

Statement of Question Involved:

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Conclusion 14

TABLE OF CASES CITED

Aguilar v. Texas, 378 U.S. 108 (1964) 6, 8, 9, 10, 14

Escobedo v. Illinois, 378 U.S. 478 (1964) 9

Giordenello v. United States, 357 U.S. 480 (1958)..... 9

Griffin v. California, 380 U.S. 609 (1965) 8, 9

Jaben v. United States, 381 U.S. 214 (1965) 9

Johnson v. New Jersey, 384 U.S. 719 (1966) 9

Jones v. United States, 362 U.S. 257 (1960) 9

Linkletter v. Walker, 381 U.S. 618 (1965) 8

Mapp v. Ohio, 367 U.S. 643 (1961) 8

Miranda v. Arizona, 384 U.S. 436 (1966) 9

Joseph Naples v. E. L. Maxwell, 393 F. 2d 615 (6th Cir. 1968) 13

Simmons v. Bomar, 230 F. Supp. 226 (M.D. Tenn. 1964) 9

Tehan v. Shott, 382 U.S. 406 (1966), *rehearing denied*, 383 U.S. 931 8

United States v. Eisner, 297 F. 2d 595 (6th Cir. 1962), *cert. denied*, 369 U.S. 859 9

Ventresca v. United States, 380 U.S. 102 (1965)...9, 10, 11

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The United States Court of Appeals for the Sixth Circuit reversed a decision of the United States District Court for the Southern District of Ohio, Eastern Division, granting petitioner a writ of habeas corpus. The opinion of the appellate court is set forth in its entirety at pages eighteen to twenty-four of petitioner's appendix. A petition for a rehearing was denied.

Petitioner was arrested on July 24, 1962 as a result of a search conducted by police officers in Youngstown, Ohio, pursuant to a search warrant issued on that date. Evidence seized by the search warrant consisted of lottery slips, lottery records, and various and sundry weapons, including automatic weapons. Immediately after the arrest of petitioner, his counsel filed several motions in the Criminal Division of the Youngstown Municipal Court relating to requests for a prehearing and motions to supress the evidence seized.

The affidavit to the search warrant was as follows, with two sentences italicized for emphasis:

AFFIDAVIT FOR SEARCH WARRANT

STATE OF OHIO
County of Mahoning } s.s.:
CITY OF YOUNGSTOWN

IN THE MUNICIPAL COURT OF YOUNGSTOWN

Before me, JUDGE MARTIN P. JOYCE, a Judge of the Municipal Court, personally appeared one GERALD BRACE who being first duly sworn according to law deposes and says:

That he believes and has good cause to believe that on or about the 24th day of July, 1962, in the City of Youngstown, Mahoning County, State of Ohio, Certain property to-wit: Explosives, gambling equipment, guns, narcotics, gambling records & monetary proceeds, stolen goods and any contraband.

In a house, building or place, described as follows, to-wit:

A certain one story brick building, located at and referred to for street purposes as 605 Carlotta dr. is occupied by Joseph Naples.

The affiant says he has good reasons to believe and does believe that the aforesaid property or some part thereof is still kept or concealed at the place aforesaid, and that there is urgent necessity for the search thereof to be made in the (nighttime) or (daytime). This affidavit is based on facts as follows: that affiant has received information which he believes to be reliable and true, that the above named items, or a part thereof, are being unlawfully kept on said premises in violation of law. *Informant states that there is a secret room in cellar. Admitted to officers that he is a part of the Naples gambling operation.* (Emphasis supplied.)

/s/ Gerald Brace

Sworn to before me by Gerald Brace, affiant, and subscribed in my presence this 24th day of July, 1962.

/s/ Martin P. Joyce

Judge of the Municipal Court
Joseph Naples
24th July 62

The facts underlying the issuance and execution of the search warrant are these: On July 24, 1962, at approximately 11:00 a.m., Detectives Gerald Brace and Martin Krohn of the Youngstown Police Department were called to police headquarters by Lieutenant Michael Carney who, at that time, was Acting Chief of the Detective Bureau. Lieutenant Carney directed the two detectives to get a search warrant for the Joseph Naples house and stated that he had been told by an informant that there was a secret room in the cellar of this residence.

Detective Brace thereupon proceeded to type an affidavit for the purpose of obtaining a search warrant for the Naples premises. The statement that Brace believed, and had cause to believe, that gambling equipment, guns, narcotics, explosives, gambling records and monetary proceeds, stolen goods and contraband were in the Naples residence, was based upon his knowledge of previous searches of the houses of Naples and one of his brothers, and upon Naples' personal admission to Brace that he and his brother were gamblers.

As originally typed by Detective Brace the affidavit did not contain the two sentences italicized above. After filling out the affidavit, and before swearing to it, Detective Brace, accompanied by Detective Krohn, applied to the Honorable Martin P. Joyce, a judge of the Municipal Court of Youngstown, for a search warrant. Judge Joyce thereupon asked the two detectives if they had any other information

to support the issuance of a warrant. Detective Brace then told the Municipal Judge that an informant had disclosed that there was a secret room in the cellar of the Naples home. He also stated that he previously had a conversation with Joseph Naples in which Naples admitted that he and his brother were gamblers. Judge Joyce, then, in his own handwriting, wrote into the affidavit the two sentences italicized above and it was sworn to by Detective Brace. Satisfied that probable cause existed, Judge Joyce issued the search warrant.

A search of the premises uncovered all the items enumerated in the search warrant with the exception of narcotics. Based upon this discovery petitioner was arrested and arraigned in the Youngstown Municipal Court. A preliminary hearing was requested and a motion to suppress the evidence seized was filed in that court.

A prehearing never was held but instead the petitioner was indicted by the Grand Jury of Mahoning County, Ohio on three indictments, charging him with:

(1) the crime of unlawfully promoting a scheme of chance, No. 21744;

(2) the crime of unlawfully and fraudulently receiving and concealing stolen property, No. 21746; and

(3) the crime of unlawfully having in his possession an automatic weapon, No. 21745.

Petitioner was tried to a jury on Cases No. 21744 and No. 21746 in the Mahoning County Court of Common Pleas. Case No. 21745 is not a subject of this present action. Petitioner was represented by counsel from the day of his arrest. Upon his conviction in Cases No. 21744 and No. 21746, he was sentenced to serve a term of from one to seven years in Case No. 21744 and a term of from one to

ten years in Case No. 21746, the sentences to run concurrently. Petitioner appealed his conviction to the Seventh District Court of Appeals where the judgment of the trial court was affirmed. An appeal to the Supreme Court of Ohio, as a matter of right, was dismissed *sua sponte* on February 13, 1966 for the reason that no substantial constitutional question was involved. Subsequently petitioner filed a petition for a Writ of Habeas Corpus in the Supreme Court of Ohio. Petitioner was afforded a hearing before the Master Commissioners of the Supreme Court, which on June 1, 1964, recommended a denial of habeas corpus for the reason that petitioner previously had raised the same issues on appeal. The court dismissed the petition.

Petitioner then filed a petition for a Writ of Habeas Corpus in the United States District Court for the Southern District of Ohio, Eastern Division on September 2, 1964, alleging that he had exhausted all of the remedies available to him in the Ohio courts and that he had been denied his constitutional right to due process of law for the reason that he was convicted on the basis of evidence obtained pursuant to a search warrant issued without sufficient legal probable cause.

Interim decisions then were made by the district court and appellate court, which resulted in the remand of the case to the district court for a hearing. A pretrial hearing was held on May 9, 1967, at which time it was concluded that the only question properly before the court dealt with the validity of the search of the premises from which the alleged illegally seized evidence was taken. This, in turn, depended upon the validity of the search warrant and/or whether petitioner had consented to the search. The hearing was held on May 22, 1967. Judge Joyce testified as a witness for the respondent. The substance of his testimony was that the matters set forth in the affidavit for a search

warrant, as presented to him, were insufficient to enable him to make a finding of probable cause upon which to issue a search warrant. He questioned the officers and as a result learned that they had received information from their superior, Officer Lieutenant Michael Carney, of a secret room in the residence to be searched and that one of the officers knew that petitioner was operating a gambling game. That as a result of this information, he personally inserted into the typed affidavit, in his own handwriting, the following: "Informant stated that there is a secret room in cellar. Admitted to officers that he is a part of the Naples gambling operation." That after soliciting this information he concluded that probable cause existed and issued the warrant. In answer to a question asked him by the court:

> "Judge Joyce, I can clear this up. If after Detectives Brace and Krohn had presented the affidavit and the warrant to you in its original condition when you first saw it, with only the typewritten matter on it, and if the two detectives were not able to offer you any further information, specifically the information that there was a secret room in this residence, would you have found probable cause for the issuance of this warrant?"

he replied, "No, I would not."

The district court granted the petition in an opinion and order filed June 28, 1967. The significant part of the opinion indicates that the court, in order to arrive at its decision, found it necessary to give retroactive effect to the decision of this Court in *Aguilar v. Texas*.[1] Respondent appealed the decision to the United States Court of Appeals, Sixth Circuit, which reversed the decision of the district court. It is from the order reversing the district court that petitioner seeks a review.

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[1] *Aguilar v. Texas*, 378 U.S. 108 (1964)

ARGUMENT

THE UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT, DID NOT ERR IN REVERSING THE DECISION OF THE UNITED STATES DISTRICT COURT GRANTING A WRIT OF HABEAS CORPUS WHEN THE RECORD DISCLOSED THAT THE SUBJECT SEARCH WARRANT WAS ISSUED AFTER AN INDEPENDENT DETERMINATION OF THE EXISTENCE OF PROBABLE CAUSE BY THE MUNICIPAL JUDGE BASED UPON PERSONAL KNOWLEDGE OF THE OFFICER MAKING THE AFFIDAVIT AND UPON RELIABLE INFORMATION OF HIS SUPERIOR OFFICER.

The United States Court of Appeals, Sixth Circuit, in its decision, found that Detectives Brace and Krohn of the Youngstown, Ohio Police Department were called into the office of Lieutenant Michael Carney, Acting Chief of the Detective Bureau, and directed to get a search warrant for petitioner's house. Lieutenant Carney stated to them that he had been told by an informant that there was a secret room in the cellar of this residence. Detective Brace thereupon typed an affidavit for the purpose of obtaining a search warrant for the premises as directed and stated that he believed, and had cause to believe, that gambling equipment, guns, narcotics, explosives, gambling records and monetary proceeds, stolen goods and contraband were in petitioner's residence. This statement was based upon his personal knowledge gained on previous searches of the premises and upon the admission by petitioner on the occasion of the prior searches that he and his brother were gamblers. It is significant that, with the exception of narcotics, all of the enumerated articles were discovered upon

the ensuing search. When the affidavit was presented to Judge Joyce initially he declined to issue the search warrant. He then determined, by questioning them, that the detectives had both reliable information and personal knowledge concerning the items sought, and in his own handwriting inserted the following: "Informant states that there is a secret room in the cellar. Admitted to officers that he is a part of the Naples gambling operation." Judge Joyce, having made this independent determination that probable cause did in fact exist, issued the warrant.

Throughout all of the proceedings in the district and appellate courts petitioner relied upon the authority of *Aguilar v. Texas, supra,* to support his position that the affidavit for the search warrant was invalid. The case had run the gamut of all the Ohio appellate courts prior to the *Aguilar* decision. The district court, in its opinion, held *Aguilar* to be retroactive in effect in order to reach its decision.

Respondent contended that *Aguilar* should not control when this Court already had determined in *Linkletter v. Walker*[2] that *Mapp v. Ohio*,[3] applying the "exclusionary rule" to the states, would not be given retrospective effect to cases finally decided prior to *Mapp*; in *Tehan v. Shott*,[4] that the rule of *Griffin v. California*,[5] concerning the comments of the failure of a defendant to take the stand, was not entitled to retrospective application in cases wherein the judgment of conviction was rendered, the availability of appeal exhausted, and the time for a petition for certiorari had elapsed or been denied prior to the date of the

[2] *Linkletter v. Walker*, 381 U.S. 618 (1965)
[3] *Mapp v. Ohio*, 367 U.S. 643 (1961)
[4] *Tehan v. Shott*, 382 U.S. 406 (1966), *rehearing denied*, 383 U.S. 931
[5] *Griffin v. California*, 380 U.S. 609 (1965)

Griffin decision; and in *Johnson v. New Jersey*,[6] that the *Escobedo v. Illinois*[7] and *Miranda v. Arizona*[8] decisions were applicable only in cases in which trial began after the decisions in those cases were announced.

Respondent argued that the trial and appellate courts in Ohio had a right to rely upon existing law in deciding the validity of the affidavit for the search warrant and cited *Jones v. United States*,[9] the gist of which was that a warrant was not issued without probable cause, notwithstanding that it was issued solely on the basis of a police officer's affidavit, reciting personal observations and upon hearsay. See also *Simmons v. Bomar*[10] and *United States v. Eisner*.[11]

Respondent further argued that the rule in *Aguilar* did not invalidate the search warrant issued by Judge Joyce since the record was clear that the judge had issued the warrant only after he had made independent investigation of the circumstances surrounding the probable cause therefor and had made a neutral judgment that resort to further criminal process was justified. This appears to have satisfied the requirements of *Giordenello v. United States*,[12] *Ventresca v. United States*,[13] and *Jaben v. United States*.[14]

Aguilar v. Texas, supra, in the last analysis, held:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 US 257, 4 L ed 2d 697, 80 S Ct 725, 78 ALR2d 233, the magistrate must be informed of some of the underlying

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[6] *Johnson v. New Jersey*, 384 U.S. 719 (1966)
[7] *Escobedo v. Illinois*, 378 U.S. 478 (1964)
[8] *Miranda v. Arizona*, 384 U.S. 436 (1966)
[9] *Jones v. United States*, 362 U.S. 257 (1960)
[10] *Simmons v. Bomar*, 230 F. Supp. 226 (M.D. Tenn. 1964)
[11] *United States v. Eisner*, 297 F. 2d 595 (6th Cir. 1962), *cert. denied*, 369 U.S. 859.
[12] *Giordenello v. United States*, 357 U.S. 480 (1958)
[13] *Ventresca v. United States*, 380 U.S. 102 (1965)
[14] *Jaben v. United States*, 381 U.S. 214 (1965)

circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 367 US 528, 11 L ed 2d 887, 84 S Ct 825, was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' Giordenello v. United States, supra, 357 US at 486, 2 L ed 2d at 1509; Johnson v. United States, supra, 333 US at 14, 92 L ed at 440, or, as in this case, by an unidentified informant."

It appears to respondent that in *Ventresca v. United States, supra,* this Court summed up the requirements for a finding of probable cause and the common sense application thereof at pages 107-109 as follows:

"While a warrant may issue only upon a finding of 'probable cause,' this Court has long held that the term 'probable cause' . . . means less than evidence which would justify condemnation,' Locke v. United States, 7 Cranch 339, 348, 3 L ed 364, 367, and that a finding of 'probable cause' may rest upon evidence which is not legally competent in a criminal trial. Draper v. United States, 358 US 307, 311, 3 L ed 2d 327, 331, 79 S Ct 329. As the Court stated in Brinegar v. United States, 338 US 160, 173, 93 L ed 1879, 1889, 69 Ct 1302, 'There is a large difference between the two things to be proved (guilt and probable cause), as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them.' *Thus hearsay may be the basis for issuance of the warrant 'so long as there (is) a substantial basis for crediting the hearsay.'* Jones v. United States, supra, 362 US at 272, 4 L ed 2d at 708, 78 ALR 2d 233.

"* * * * * * * * *

"These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

"* * * * * * * * *

"Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner. *Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.* Jones v. United States, supra, 362 US at 270, 4 L ed at 707, 78 ALR 2d 233." (Emphasis supplied.)

In summary Judge Martin P. Joyce, the Municipal Judge of the Youngstown, Ohio Municipal Court, who issued the search warrant objected to herein, testified before the district court. He recalled that when Detectives Jerry Brace and Marty Krohn came into his chambers with copies of an affidavit and presented them to him that he did not feel that the matters set forth in the affidavit were sufficient to

enable him to make a finding of probable cause upon which to grant a search warrant. He then requested additional information from the officers. As a result of his questioning them, he learned that they had information of a secret room in the residence at 605 Carlotta Drive and he further learned that Jerry Brace knew that petitioner was operating a gambling game. After receiving this information he personally inserted into the typed affidavit in his own handwriting, "Informant stated that there is a secret room in cellar. Admitted to officers that he is a part of the Naples gambling operation." That after eliciting this information he issued the warrant. On cross-examination, Judge Joyce indicated that if the two detectives had not been able to offer further information specifically, that there was a secret room in the residence, he would not have found probable cause for the issuance of the warrant.

There is little doubt that Judge Joyce made an independent determination that probable cause did exist before a search warrant was issued. Respondent maintains that under the law in existence at the time of the issuance of the warrant, the municipal judge made every effort to assure himself that he was not acting as a rubber stamp for the police department but in fact made an individual determination on his own that probable cause existed for the issuance of the warrant. The Common Pleas Court, based upon its knowledge that the affidavit as it was originally typed, with the addition of the judge's handwritten words, had every reason to believe that the municipal judge had made a fair and independent determination of probable cause. This also is true of the Ohio appellate courts. Consequently, when the Supreme Court of Ohio denied the appeal on the basis that no substantial constitutional question existed, it was relying upon the law in effect at the

time of its ruling. This was the basis upon which the United States Court of Appeals made its decision wherein the court held:

> "We hold that the District Court was in error in ruling the affidavit to the se rch warrant to be insuffi-ci nt under *Aguilar v. Texas, supra.* In that case the Supreme Court said:
>
> > "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States,* 362 U.S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States,* 376 U.S. 528, was 'credible' or his information 'reliable.' 378 U.S. at 114.
>
> "There can be no doubt that, before issuing the search warrant, Municipal Judge Joyce made an independent determination that probable cause existed. After conducting personal inquiry and satisfying himself of the persuasiveness of the facts relied upon, including the fact that Naples had admitted to Officer Brace that he and his brother were gamblers, Judge Joyce inserted the two sentences above quoted. With these sentences added, it is our opinion that the affidavit meets the test of *Aguilar.*
>
> "The issuance and execution of this search warrant and the trial conviction of Naples took place prior to decision of the Supreme Court in *Aguilar,* which was announced on June 15, 1964. The District Court ruled that the decision in *Aguilar* is retroactive in its application. Since we find the affidavit to be sufficient, it is not necessary to pass upon the question of whether *Aguilar* is retroactive or only prospective in its effect." *Joseph Naples v. E. L. Maxwell.*[15]

[15] *Joseph Naples v. E. L. Maxwell,* 393 F. 2d 615 (6th Cir. 1968)

CONCLUSION

The United States Court of Appeals had before it ample evidence to indicate that the issuing judge, after conducting a personal inquiry, had before him adequate information to conclude that probable cause existed to justify his issuing the search warrant and that he did so in the exercise of his own independent judgment. It, therefore, found that the affidavit, as supplemented by the judge, met the test of *Aguilar v. Texas, supra.* Respondent submits that the decision is not in conflict with any decision of this Court or of any other federal appellate court nor did it decide an important question of federal law which has not been settled by this Court. Respondent, wherefore, prays that the petition be denied.

Respectfully submitted,

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